

OPINION ENTERED: May 11, 2012

CLAIM NO. 201000459

MODERN PROPERTY MANAGEMENT

PETITIONER

VS.

**APPEAL FROM HON. OTTO DANIEL WOLFF, IV
ADMINISTRATIVE LAW JUDGE**

ESTATE OF JEFFREY ALLEN WILBURN (DECEASED)
and HON. OTTO DANIEL WOLFF, IV
ADMINISTRATIVE LAW JUDGE

RESPONDENTS

**OPINION AND ORDER
DISMISSING AND REMANDING**

* * * * *

BEFORE: ALVEY, Chairman, STIVERS and SMITH, Members.

STIVERS, Member. Modern Property Management ("Modern") appeals from the October 10, 2011, opinion and order of Hon. Otto Daniel Wolff, IV, Administrative Law Judge ("ALJ") finding "that the relationship between Plaintiff [sic] and Defendant, when Plaintiff [sic] was shot, was that of employee/employer," and determining "Plaintiff [sic] is entitled to receive and Defendant is obligated to

pay death benefits as provided in KRS 342.750." Modern also appeals from the November 14, 2011, order overruling its petition for reconsideration. We conclude the ALJ's October 10, 2011, opinion and order is not a final, appealable and enforceable award and order, and the notice of appeal is defective. Therefore, we do not have jurisdiction to consider the merits of this appeal and dismiss the appeal. Accordingly, we will only discuss the facts relevant to our dismissal of Modern's appeal.

Jeffrey Allen Wilburn ("Wilburn") was employed by Modern as the "field operations manager." Tim Scott ("Scott"), president of Modern, testified Modern is a property management company providing "turn-key management" of properties including among other services "putting together a maintenance plan." Modern managed the apartment building located at 209 Lakeshore Drive. Wilburn resided in apartment four in the building. On March 11, 2009, Wilburn was shot and killed by Latarra Martin who lived in apartment three at 209 Lakeshore Drive.¹ At the time of his death, Wilburn was unmarried and had three children Amanda Wilburn, Maxwell Wilburn, and Icy Savannah Beth Canter.

¹ Testimony reflects a Fayette Circuit Court jury found Latarra Martin guilty of murder, but mentally ill.

On April 12, 2010, Julie Van Hook, as Administratrix ("Administratrix") of the Estate of Jeffrey Allen Wilburn, filed a Form 101 alleging Wilburn was killed on March 11, 2009, as a result of a gunshot. Attached to the Form 101 is Wilburn's death certificate. The Form 101 lists Amanda Wilburn, daughter, Maxwell Wilburn, son, and Icy Canter, daughter, as Wilburn's sole dependents. The Form 101 is signed by Van Hook as Administratrix of the Estate of Jeffrey Allen Wilburn. On February 8, 2011, the Administratrix filed copies of the birth certificates of Wilburn's three children. On March 9, 2011, the Administratrix moved to amend the Form 101 requesting as follows:

...to amend the Form 101 and to have the caption reflect the application and claim for benefits has been brought on behalf of the Estate of Jeffrey Allen Wilburn (Deceased) as well as the surviving minor and dependent children of the deceased, Maxwell Riley Wilburn, Amanda Michelle Wilburn, and Icy Savannah Beth Canter.

By order dated March 22, 2011, the ALJ sustained the motion to amend and ordered as follows:

[The] Form 101 and style of this case shall be amended to reflect that the claim is brought on behalf of the Estate of Jeffrey Allen Wilburn as well as the surviving minor and dependent children of the deceased, Maxwell Riley

Wilburn, Amanda Michelle Wilburn, and
Icy Savannah Beth Canter.

The parties introduced proof on the issue of whether Wilburn's death arose out of and in the course of his employment. The transcripts of the witnesses' testimony in Fayette Circuit Court Indictment Number 09-CR-1169 along with the deposition of Van Hook and Scott were filed in evidence.

On July 12, 2011, the Plaintiffs filed a "Motion to Submit Case" requesting the ALJ to cancel the benefit review conference ("BRC") scheduled for September 14, 2011, and set a date for submission of the case. The Plaintiffs asserted the sole issue before the ALJ was whether Wilburn's death arose out of and in the course and scope of his employment with Modern. The Plaintiffs stated the parties have waived the right to a hearing and have submitted evidence which included "criminal trial transcripts" to be considered by the ALJ. The Plaintiffs also asserted a hearing is not needed and would only further delay the final determination. Further, the Plaintiffs stated when the parties last met in March they agreed to allow an additional thirty days to submit proof which has now expired. With the submission of the transcripts of the criminal proceeding, the Plaintiffs

maintained all evidence is in the record and the case is ripe for submission. The Plaintiffs requested entry of an order requiring briefs be filed and the case be submitted on or before August 1, 2011. On July 25, 2011, Modern filed a response stating it had no objection to waiving the hearing and submitting the case on the record and requested the parties have until August 15, 2011, to file briefs.

In an August 1, 2011, order, the ALJ noted the Plaintiffs had filed a motion to submit and counsel for Modern had agreed to waive the final hearing and submit the case for a decision with briefs to be filed on or before August 15, 2011. The ALJ sustained the motion and gave the parties up to and including August 15, 2011, to file their briefs. The ALJ cancelled the BRC scheduled for September 14, 2011, and directed the claim would stand submitted for a decision as of August 16, 2011.

In an October 10, 2011, opinion and order, the ALJ ordered and adjudged Wilburn's death "was related to or [sic] arose out of his employment," and the "Plaintiff [sic] is entitled to receive and Defendant is obligated to pay death benefits as provided in KRS 342.750." However, the ALJ did not determine the amount and duration of the benefits each of Wilburn's three minor children shall receive pursuant to KRS 342.750(1)(d) and (e). In

calculating the benefits to which the three minor children are entitled, the ALJ must first determine Wilburn's average weekly wage at the time of his death.² KRS

342.750(1)(d) and (e) reads as follows:

If the injury causes death, income benefits shall be payable in the amount and to or for the benefit of the persons following, subject to the maximum limits specified in subsections (3) and (4) of this section:

. . .

(d) To the children, if there is no widow or widower, 50 percent of such wage for one (1) child, and 15 percent for each additional child, divided among such children, share and share alike.

(e) The income benefits payable on account of any child under this section shall cease when he dies, marries, or reaches the age of eighteen (18), or when a child over such age ceases to be physically or mentally incapable of self-support, or if actually dependent ceases to be actually dependent, or, if enrolled as a full-time student in any accredited educational institution, ceases to be so enrolled or reaches the age of 22. A child who originally qualified as a dependent by virtue of being less than 18 years of age may, upon reaching age 18, continue to qualify if he satisfies the tests of being physically or mentally incapable of self-support, actual dependency, or

² Presumably, Modern did not file an AWW-1 pursuant to 803 KAR 25:010 Section 13(9)(a) because the BRC was cancelled. Further, the Plaintiffs did not file any evidence relating to Wilburn's AWW.

enrollment in an educational institution.

In addition, the ALJ did not award a lump sum benefit to the estate pursuant to KRS 342.750(6). Further, the ALJ did not award medical benefits which may have been incurred for Wilburn's treatment prior to his death, even though the Administratrix testified she incurred a "huge bill" associated with the initial transporting and care of Wilburn following the shooting.

Since the ALJ's October 10, 2011, opinion and order is interlocutory and does not represent a final, appealable, and enforceable order, we believe Modern's appeal must be dismissed. 803 KAR 25:010, § 21(2)(a), provides as follows:

[w]ithin thirty (30) days of the date of a final award, order or decision rendered by an administrative law judge pursuant to KRS 342.275(2) is filed, any party aggrieved by that award, order or decision may file a notice of appeal to the Workers' Compensation Board.

803 KAR 25:010, § 21(2)(b) defines a final award, order or decision as follows: "[a]s used in this section, a final award, order or decision shall be determined in accordance with Civil Rule 54.02(1) and (2)."

Civil Rule 54.02(1) and (2) state as follows:

(1) When more than one claim for relief is presented in an action, . . . the court may grant a final judgment upon one or more but less than all the claims or parties only upon a determination that there is no just reason for delay. The judgment shall recite such determination and shall recite that the judgment is final. In the absence of such recital, any order or other form of decision, however designated, which adjudicates less than all the claims or the rights and liabilities of less than all the parties shall not terminate the action as to any of the claims or parties, and the order or other form of decision is interlocutory and subject to revision at any time before the entry of judgment adjudicating all the claims and the rights and liabilities of all the parties.

(2) When the remaining claim or claims in a multiple claim action are disposed of by judgment, that judgment shall be deemed to readjudicate finally as of that date and in the same terms all prior interlocutory orders and judgments determining claims which are not specifically disposed of in such final judgment.

The requisite language in CR 54.02(1) and (2) is not contained in the opinion and order. In addition, the ALJ's October 10, 2011, decision is entitled "opinion and order" and does not reflect it is an award. Stated another way, the October 10, 2011, opinion and order does not expressly award any income or medical benefits.

An order of an ALJ is appealable only if: 1) it terminates the action itself; 2) acts to decide all matters litigated by the parties; and 3) operates to determine all the rights of the parties so as to divest the ALJ of authority. See KI USA Corp. v. Hall, 3 S.W.3d 355 (Ky. 1999); Ramada Inn v. Thomas, 892 S.W.2d 593 (Ky. 1995); Transit Authority of River City v. Saling, 774 S.W.2d 468 (Ky. App. 1980).

We conclude the October 10, 2011, opinion and order of the ALJ does not meet any of the criteria set out above. In this case, pursuant to KRS 342.750(1)(d)(e), the ALJ must determine Wilburn's average weekly wage and calculate the amount and duration of the income benefits which each of the three minor children shall receive. Pursuant to KRS 342.750(6), the ALJ must award a lump sum benefit to the estate and also award medical benefits pursuant to KRS 342.020. The October 10, 2011, opinion and order addresses none of these issues. As it stands now, the parties must compute and agree on the benefits to which the three minor children are entitled and must also agree on the lump sum benefit the estate is to receive. Currently, the parties have no way of resolving any dispute which may arise over the income benefits to which the three minor children are entitled and the lump sum

benefit to which the estate is entitled. Likewise, there must be a general award of medical benefits pursuant to KRS 342.020. As a matter of law, the October 10, 2011, opinion and order and the order ruling on the petition for reconsideration must be deemed interlocutory. Clearly, there remain numerous issues which the ALJ must resolve before there can be an enforceable and final opinion, award, and order.

Our holding aside, assuming *arguendo*, the October 10, 2011, opinion and order is final and appealable, Modern's notice of appeal is defective. The caption of the notice of appeal reads as follows: "Modern Property Management v. Estate of Jeffrey Allen Wilburn (deceased), and Hon. Otto Daniel Wolff, IV, ALJ." The body of the notice of appeal states as follows:

Comes now the employer, Modern Property Management, by and through counsel, and hereby gives notice of its appeal to the Workers' Compensation Board from the Opinion, Award and Order rendered in this matter on October 10, 2011 and the subsequent Order on Petition for Reconsideration rendered on November 14, 2011. The Respondents against whom this appeal is taken are plaintiff, Estate of Jeffrey Allen Wilburn (Deceased) and Honorable Otto Daniel Wolff, IV, ALJ.

The notice of appeal and body of the notice of appeal fails to name the Administratrix and the three minor dependent children of Wilburn as parties against whom the appeal is taken. In the case *sub judice*, the Administratrix and the three minor children are the claimants and, as such, are indispensable parties to the appeal and must be named as respondents in the notice of appeal. Since these individuals are not named as parties to the appeal, this Board is without jurisdiction to rule on the merits of Modern's appeal. Failure to name an indispensable party, in this case the Administratrix and Wilburn's three minor children, is a jurisdictional defect fatal to Modern's appeal. Commonwealth of Kentucky, Department of Finance, Division of Printing v. Drury, 846 S.W.2d 702 (Ky. 1993). Consequently, assuming Modern appealed from a final and appealable order, we would be without jurisdiction to rule on the merits of the argument raised by Modern on appeal. An indispensable party to an appeal is one whose absence prevents the tribunal from granting complete relief among those already listed as parties. See CR 19.01; CR 19.02; Braden v. Republic-Vanguard Life Ins. Co., 657 S.W.2d 241 (Ky. 1983); Milligan v. Schenley Distillers, Inc., 584 S.W.2d 751 (Ky. App. 1979). As a matter of law, the failure to name an

indispensable party is a jurisdictional defect fatal to an appeal – even one to this Board. *Id.*

Accordingly, the appeal of Modern is **DISMISSED WITHOUT PREJUDICE** and this claim is **REMANDED** to the ALJ for further proceedings and entry of a final and appealable opinion, award, and order.

ALL CONCUR.

FRANKLIN A. STIVERS, MEMBER,
WORKERS' COMPENSATION BOARD

COUNSEL FOR PETITIONER:

HON ROBERTA K KISER
271 W SHORT ST STE 100
LEXINGTON KY 40507

COUNSEL FOR RESPONDENT:

HON LAURIE GOETZ KEMP
3620 BLACKISTON BLVD STE 200
NEW ALBANY IN 47150

ADMINISTRATIVE LAW JUDGE

HON OTTO D WOLFF IV
8120 DREAM ST
FLORENCE KY 41042